

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROY FERNANDO TORRES-GARCIA

Claimant

VS.

EXIDE CORPORATION

Respondent

AND

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

Docket No. 1,046,611

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 12, 2011, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Scott M. Price, of Salina, Kansas, appeared for claimant. Dustin J. Denning, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to prove that his need for back treatment was attributable to his January 23, 2009, injury and that claimant failed to establish his need for additional treatment for his January 23, 2009, injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 12, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's findings that claimant failed to prove he was in need of additional treatment for his work-related injury of January 23, 2009, and that claimant failed to establish that his need for back treatment was attributable to the January 23, 2009, injury.

Respondent argues that the evidence does not show that claimant's low back condition arose out of and in the course of his employment or that it is the natural and probable consequence of claimant's original injury to his right foot.

The issues for the Board's review are:

(1) Did claimant's low back condition arise out of and in the course of his employment as a natural and probable consequence of claimant's original injury to his right foot?

(2) Does the Board have jurisdiction over the issue of whether claimant is in need of additional treatment for his work-related injury?

FINDINGS OF FACT

At the preliminary hearing in this case on January 12, 2011, the ALJ set out that the reason for the hearing was claimant's request for medical treatment.

ALJ MOORE: . . . The claimant is here today seeking treatment for his back complaints. Mr. Price [claimant's attorney], have I accurately characterized your claim and request for relief?

MR. PRICE: Yes, Your Honor.¹

Claimant was injured on January 23, 2009, when a lead bar fell on his right foot and fractured his third and fourth metatarsals. He was treated with medication and was given a walking boot and crutches. Claimant claims that he developed back pain a couple of months after his foot injury. He complained of his back pain to Dr. Grauerholz, who had been treating him for his foot injury. Claimant said that Dr. Grauerholz sent him to physical therapy for his foot and his back.

On July 17, 2009, claimant had an MRI of his lumbar spine that showed a mild bulging of the disc on the right at L5-S1. Claimant was seen by Dr. Bernard Poole on September 1, 2009.² Claimant complained of constant pain in his right foot and calf that worsened with weight bearing. Claimant also complained of low back pain on the right side. Claimant told Dr. Poole that he had been off work six weeks following the accident and then returned to sedentary work. He was using a cane for walking but because he was having so much pain, he began to use crutches. Claimant had been off work for three weeks before his visit to Dr. Poole. Dr. Poole's medical records show that with encouragement, claimant was able to bear weight on his right leg, although with "theatrical

¹ P.H. Trans. at 4-5.

² The record does not indicate who referred claimant to Dr. Poole.

face grimacing and a peculiar hopping movement on the right leg."³ Claimant also demonstrated the ability to stand and walk a short distance on his toes and heels. Dr. Poole noted claimant had an "inconsistent type of limping on the right leg."⁴ When examining claimant's back, Dr. Poole found no guarding, spasm, or localized tenderness. Claimant had normal symmetry of his pelvis. He had full range of motion, although Dr. Poole again noticed that the testing "was accompanied by facial grimaces and protestations of pain."⁵ Dr. Poole said a review of the July 2009 MRI showed a normal lumbar spine and also said that claimant's "complaints of pain are really not in keeping with the paucity of the physical findings."⁶

Dr. Poole saw claimant again on September 15, 2009. Examination findings were the same as on claimant's first visit, except that Dr. Poole was unable to get claimant to attempt to walk on his heels or toes. Also, claimant would not move his back more than fractionally during range of motion testing on his low back, claiming it was too painful. Dr. Poole indicated he could not find an abnormality for which orthopedic surgical intervention was required. He indicated there was a possibility claimant had a form of complex regional pain syndrome for which appropriate treatment would be non-narcotic anti-inflammatory medication and a return to weight bearing on the foot.

Claimant said he continued to use a cane through January 2010, when he left his employment at respondent. On November 17, 2009, he filled out an application for employment with Mid Kansas Underground, Inc. (Mid Kansas). When filling out the application, claimant indicated that he had a previous injury to his right foot but that he had recovered. Claimant also denied any previous back injury. Claimant said that he can "sort of" read English, but his wife helped him fill out the application.⁷ Claimant was hired by Mid Kansas on January 26, 2010. Mid Kansas is a company that buries wires, cable and pipe in the ground. About half claimant's time is spent on a machine that digs holes, and the other half of the time is spent fixing and setting up to bring in the wire.

Stacy Gonzales, who works for respondent in its human resources department, testified that on February 11, 2010, she saw claimant at Wal-mart. She noticed he was not using a cane or crutches and that he was walking normally. She said claimant did not appear to be in pain. She took photographs of claimant using her camera phone.

³ P.H. Trans., Resp. Ex. B at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ P.H. Trans. at 23.

Claimant acknowledged the pictures were taken of him on February 11, 2010, and said that by that time he had discontinued his use of the cane.

Another MRI of claimant's lumbar spine, taken on April 16, 2010, showed that claimant had a small midline herniation at L4-5 that had developed since the July 2009 MRI. The remainder of the April 2010 MRI was unremarkable, with the exception of the minimal bulging at L5-S1, which had not changed since July 2009.

On September 14, 2010, claimant went to the emergency room complaining of severe back pain since the previous Friday (September 10). Claimant said he was not doing anything that would have caused his back pain to increase; he was just doing his regular duties.

Claimant was seen by Dr. Peter Bieri, on September 30, 2010, at the request of claimant's attorney. Claimant gave a history of his injury and treatment. He denied having any preexisting injuries to either his right foot or his low back. Dr. Bieri found claimant had a slightly antalgic gait that favored the right. After examining claimant, Dr. Bieri concluded that claimant's work-related injury to the right foot on January 23, 2009, resulted in gait abnormality. Dr. Bieri opined that as a result of claimant's gait abnormality, he developed persistent low back pain. Dr. Bieri found that claimant was at maximum medical improvement in regard to his right foot but not his low back. He recommended claimant be treated with epidural block injection therapy and pain management.

On December 2, 2010, claimant was seen by Dr. Paul Stein at the request of respondent. During his examination, claimant said his right foot pain ranged from levels 7 to 9 and a scale of 0 to 10, and that his back pain was at levels 9 to 10. Claimant said his pain was a level 10 during the examination, but he did not squirm or get up from his chair. After the examination, Dr. Stein diagnosed claimant with fracture of the third and fourth metatarsal bones of his right foot, healed. In regard to the low back, Dr. Stein diagnosed him with mechanical lumbar strain with L4-5 disc herniation. He stated, "To what extent the mechanically abnormal gait contributed to the subsequent herniation I cannot state with certainty but it is more likely than not that there is some relationship."⁸ Dr. Stein did not recommend surgery on the 26-year-old claimant. Nor did he have any recommendations for additional conservative treatment for the back.

⁸ P.H. Trans., Cl. Ex. 2 at 7.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and

⁹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹⁰

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹³

In *Logsdon*,¹⁴ the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence

¹⁰ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

¹¹ K.S.A. 2010 Supp. 44-501(a).

¹² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹³ *Id.* at 278.

¹⁴ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Casco*,¹⁵ the Kansas Supreme Court states: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁷

ANALYSIS

There is no dispute that claimant sustained a compensable injury to his right foot on January 23, 2009. The dispute is whether claimant’s current back and leg complaints are causally connected to that foot injury. Claimant denies having back problems before his foot injury. He relates his low back symptoms to the abnormal gait caused by his foot injury.

Dr. Poole opined that claimant may be suffering from a form of complex regional pain syndrome. He did not say whether he considered this condition to be related to claimant’s work injury. Dr. Bieri opined that claimant’s foot injury caused a gait abnormality that, in turn, caused claimant’s low back pain. Dr. Stein likewise opined there was probably a causal relationship between the abnormal gait and claimant’s back problems. Based upon the record presented to date, this Board Member concludes that claimant’s low back condition is the direct and natural consequence of the foot injury. As such, claimant’s back injury arose out of and in the course of claimant’s employment with respondent.

All three doctors whose opinions are in evidence believe that claimant is at maximum medical improvement with respect to his foot injury. With respect to the back, however, their opinions vary both as to diagnosis and treatment. Dr. Poole recommended essentially just anti-inflammatory medication. Dr. Bieri recommended epidural block injections and pain management. Dr. Stein, like Dr. Poole, did not recommend surgery.

¹⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494 (2007).

¹⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹⁷ K.S.A. 2010 Supp. 44-555c(k).

He had no additional recommendations for additional treatment. Claimant has also been seen by Dr. Jonathan Morgan, who recommended surgery.

The ALJ held:

Claimant's preliminary hearing requests for back treatment are considered and denied. Claimant has failed to establish that he is in need of additional treatment for his work-related injury of January 23, 2009 or that his need for back treatment is attributable to the January 23, 2009 injury.¹⁸

On an appeal from a preliminary hearing order, the Board is without jurisdiction to review an ALJ's determination of whether a claimant is in need of medical treatment. K.S.A. 44-534a grants the ALJ the jurisdiction and authority to make that determination and, therefore, the ALJ's order does not exceed his jurisdiction. It is not clear, however, whether the ALJ denied medical treatment solely because he did not believe claimant needed treatment or whether he did not consider the treatment claimant needs to be due to the work-related injury. If the former, then the issue is not jurisdictional; if the latter, then the Board does have jurisdiction and, as the back is found compensable, medical treatment could be ordered to be provided by respondent.

CONCLUSION

(1) In addition to his foot, claimant suffered injury to his back that arose out of and in the course of his employment with respondent.

(2) The Board is without jurisdiction to review the ALJ's findings with regard to whether claimant is in need of additional medical treatment, but if the ALJ's denial of treatment was based upon a finding that claimant's back condition is not causally connected to his compensable foot injury, then that finding is reversed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 12, 2011, is reversed in part and remanded to the ALJ for clarification and, if found appropriate, for further orders for medical treatment to cure and relieve the effects of claimant's current back condition.

IT IS SO ORDERED.

¹⁸ ALJ Order (Jan. 12, 2011).

Dated this _____ day of March, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge